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DEPARTMENT OF EDUCATION

2 CFR Part 3474

34 CFR Parts 74, 75, 76, 77, 80, 101, 206, 222, 225, 226, 270, 280, 299, 300, 303, 350, 361, 363, 364, 365, 367, 369, 370, 373, 377, 380, 381, 385, 396, 400, 426, 460, 491, 535, 606, 607, 608, 609, 611, 614, 628, 636, 637, 642, 643, 644, 645, 646, 647, 648, 650, 654, 655, 661, 662, 663, 664, 682, 692, 694, and 1100

RIN 1890-AA19

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary adopts as final regulations of the Department the interim final regulations that were published on December 19, 2014. This action adopts the OMB guidance in title 2 of the CFR as final regulations of the Department. The Secretary amends the interim final regulations to correct technical errors contained in the amendments.

DATES: These regulations are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Executive Summary:

Purpose of This Regulatory Action: On December 19, 2014, all of the Federal award-making agencies published a joint Interim Final Rule (IFR) in the Federal Register, implementing the Office of Management and Budget's (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal awards (Uniform Guidance). The purpose of this action is to adopt the Uniform Guidance in 2 CFR part 200, except for 2 CFR 200.102(a), CFR 200.207(a). This adoption gives regulatory effect to the OMB guidance and supplements that guidance, as needed, for the Department. The authority to amend chapter XXXIV of title 2 of the Code of Federal Regulations and subtitle A and chapters I, II, III, IV, V, and VI of title 34 of the Code of Federal Regulations is 20 U.S.C. 1221e-3, 3474, and 2 CFR part 200, unless otherwise noted.

Summary of the Major Provisions of This Regulatory Action: This rule allows the Department to incorporate into regulation and thus bring into effect the Uniform Guidance as required by OMB and reduces administrative burden and risk of waste, fraud, and abuse for the funds awarded by the Department through grants and cooperative agreements.

Costs and Benefits: The Secretary believes that these regulations do not impose significant costs on entities that would receive assistance through Department of Education programs. The benefits of the regulations far outweigh any potential costs incurred by entities. The benefits of the amendments in these regulations include eliminating duplicative and conflicting guidance contained in eight previously separate sets of OMB guidance documents; streamlining reporting requirements; reducing burden for entities that have never received an indirect cost rate; and setting standard business processes using data definitions to reduce administrative burden on non-Federal entities that conduct business with multiple federal agencies.

On December 19, 2014, the Secretary published an IFR for these amendments in the Federal Register (79 FR 75871).

Except for minor editorial and technical revisions, there are no differences between the IFR and these final regulations.

#### Technical Changes

The Secretary makes two amendments to the interim final regulations to correct errors made in the adoption of the Uniform Guidance. First, in amending §75.135 to reference the Uniform Guidance, the Department failed to amend paragraph (b) of that section to reference the correct requirement in part 200. Second, in amending 34 CFR part 75, the Department inadvertently removed §75.263 when we should have just revised the cross references in that section to refer to the appropriate citation in the Uniform Guidance. These two errors are corrected in these final regulations.

Public Comment: In response to our invitation in the IFR, one party submitted comments directed at the Department's proposed adoption of the interim final regulations in 2 CFR part 200. Generally, we do not address technical and other minor changes raised by the comments.

Analysis of Comments and Changes: An analysis of the comments follows.

Comment: The commenter requested clarification on whether or not the Department would grant local educational

agencies (LEAs) a one-year grace period for implementing the procurement standards in 2 CFR 200.317 through 200.326. The commenter also sought clarity on the specific date that the procurement standards would go into effect for LEAs after the grace period.

Discussion: The Uniform Guidance regulations, as adopted by the Department, 79 FR 75872 (December 19, 2014) authorize all non-Federal entities (including LEAs) to delay implementation of the procurement requirements in 2 CFR 200.318 through 200.326 for one fiscal year after the regulations would otherwise apply to a grant. A recent technical amendment to the Uniform Guidance expanded that grace period to two years. See 80 FR 54407 (September 10, 2015). As such, each LEA will have the option of delaying implementation of the procurement standards until the end of its second fiscal year that begins after the effective date of the Uniform Guidance (December 26, 2014). For LEAs with a fiscal year that ends on June 30, 2015 that decide to defer implementation for the full two years, the LEA's new procurement standards would not have to be effective until July 1, 2017.

Changes: None.

Comment: The commenter requested clarification of the phrase "tangible personal benefit" in 2 CFR 200.318(c)(1).

Discussion: The phrase "tangible personal benefit" is new language added to the general conflict of interest section of the general procurement standards that existed previously under the Education Department General Administrative Regulations (EDGAR) 34 CFR 80.36(b)(3) and OMB Circular A-102. The language was expanded from just "financial or other interest in" to also include "or a tangible personal benefit from" a firm considered for a contract from a grantee. This new language stresses the importance of ensuring that employees who select, award, and administer contracts supported by a Federal award are free from any real or apparent conflict of interest, including financial interests and other non-financial benefits that result in a personal benefit for the employee (such as improved employment opportunities, business referrals, political influence, etc.).

Changes: None.

Comment: The commenter expressed concern regarding the conflict of interest rules in 2 CFR 200.319(a), specifically with regard to vendors with specialized expertise that may collaborate with grant applicants, because these vendors would be excluded from competing for a contract (if the applicant is awarded a grant) due to their organizational conflict of interest. The commenter

requested that the Department issue guidance allowing vendors to provide minimal input to applicants, such as LEAs, for the purpose of informing a Request for Proposal (RFP) and to not prohibit these vendors from competing for the RFP because of a conflict of interest.

Discussion: The Department understands that an LEA may need to inform itself about the capacity and capability of potential contractors in order to prepare an RFP. In the course of doing so, an LEA may contact a number of vendors to collect information necessary for developing the RFP, as long as the LEA poses its request for information broadly so that any potential vendor has an opportunity to provide input. Soliciting input from one or two vendors would create, in most cases, an unfair competitive advantage constituting an organizational conflict of interest.

Changes: None.

Comment: The commenter raised concerns with regard to the prohibition of using "brand name" instead of "an equal" product in order to avoid restrictive competition under 2 CFR 200.319(a)(6). Specifically, the commenter noted that in some cases, a school may have already invested in a particular technology infrastructure or selected a particular instructional framework and it would be impractical or impossible to switch to another product or

instructional approach. The commenter requested that the Department issue guidance to clarify when specifying a "brand name" might be appropriate and not considered a restriction on competition under 2 CFR 200.319(a)(6).

Discussion: The new procurement requirements in the Uniform Guidance do not require an LEA to abandon a technology or instructional approach just because a similar technology or instructional approach would cost less. The Department also understands that in some limited situations, specifying a "brand name" may not restrict competition under 2 CFR 200.319(a)(6). If an LEA has already invested in a particular infrastructure or instructional framework, specifying a "brand name" compatible with the infrastructure or framework may be appropriate. However, the procurement regulations are designed to ensure competition so the selected proposal is most advantageous to the program, with price and other factors considered. Thus, the LEA needs to compete to find the lowest cost supplier of the technology or instructional approach (other factors) desired by the LEA. The Department will consider developing additional guidance on this issue.

Changes: None.



Comment: The commenter noted two instances in which it believes that procurement by noncompetitive proposals (sole sourcing) should be allowed under 2 CFR 200.320(f)(1) where "the item is available only from a single source." The first situation involves instances where an LEA has an existing technology infrastructure or instructional framework and requires specific hardware or software; the second situation involves instances where schools engage in pilot trials for educational technologies or instructional strategies or materials and want to "scale up" the piloted product.

Discussion: Generally, procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source. The use of this procurement method is permitted under very limited circumstances, but one basis for an authorized sole source contract is when the item is available only from a single source (2 CFR 200.320(f)(1)). If particular software or hardware is required because of an LEA's existing technology infrastructure or instructional framework and the hardware or software is truly only available from one source, noncompetitive procurement may be appropriate. The LEA must maintain records documenting the rationale for why sole sourcing was used (2 CFR 200.318(i)). If the desired

software or hardware is available from more than one vendor, the LEA must use a competitive process, as described in 2 CFR 200.320(d).

LEAs that engage in pilot trials of educational technologies or instructional materials that then wish to “scale up” are not exempted from competitive procurement. Procurement transactions must be conducted in a manner providing full and open competition, as described in 2 CFR 200.319. If an LEA wants to experiment with a new educational technology or instructional strategy or material, it may do so without violating conflict of interest requirements by holding an open procurement competition, identifying the specifications for the technology, strategy, or material and stating the initial contract would be for a pilot of that product with an option to “scale up” the product if the pilot proves successful.

Changes: None.

Comment: The commenter raised concerns regarding the cost and efficiency of competitive bidding required under 2 CFR 200.320, noting that it would be more cost effective for the LEA to perform a cost analysis rather than use a Request for Proposal (RFP) process. The commenter encouraged the Department to allow for instances when the

small purchase procedures could be used for procurements that exceed the Simplified Acquisition Threshold, including when the item is a commercially available product.

Discussion: The Department has allowed for limited instances when small purchase procedures may be used for procurements that exceed the simplified acquisition threshold. These limited instances are specified in a section in EDGAR that was established in 2013, 34 CFR 75.135, which authorizes discretionary grant applicants to use the informal small purchase procedures to procure evaluation service providers and providers of any other service that is essential to the grant, provided that the service provider is identified in the grant application. The service provider must be needed to meet a statutory, regulatory, or priority requirement related to the competition. See the final rulemaking document, published at 78 FR 49352, August 13, 2013, for a fuller discussion of the requirements in §75.135. These limited exceptions do not include allowing the use of small purchase procedures just because an item is a commercial (off the shelf) product and not one that is custom-built based on unique specifications.

Changes: None.

Comment: The commenter sought clarification from the Department on whether or not price comparison under 2 CFR 200.323 could be considered a form of price competition, such that a non-federal entity would not be required to negotiate price as a separate element.

Discussion: Price comparison is not a form of price competition that would exempt a non-federal entity from negotiating price as a separate element of the price.

Changes: None.

Comment: The commenter sought clarification on the definition of "procurement" for determining whether or not the transaction meets the small purchase or simplified acquisition threshold.

Discussion: The word "procurement" is used consistently throughout the Uniform Guidance and the Department does not intend to use that term differently in its implementation of the Uniform Guidance. The simplified acquisition threshold is the "dollar amount below which a non-Federal entity may purchase property or services using small purchase methods" (2 CFR 200.88). If a non-Federal entity seeks to acquire property or services that have an anticipated dollar value exceeding the simplified acquisition threshold, the non-Federal entity must use a competitive process and cannot use small purchase

procedures unless the procurement meets the requirements of 34 CFR 75.135. Procurement actions must not be split into separate procurements to avoid competition thresholds.

Changes: None.

After consideration of all the comments regarding the IFR, the Secretary makes no changes to the regulations adopting the Uniform Guidance that were published on December 19, 2014 except for the two technical amendments discussed earlier in this preamble.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives

and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

#### Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

#### Intergovernmental Review

These regulations are subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part



79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for these regulations.

#### Assessment of Educational Impact

In the IFR we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the IFR and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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Arne Duncan,  
Secretary of Education.

For the reasons discussed in the preamble, and under the authority of 5 U.S.C. 301 and the authorities listed below, the interim rule amending chapter XXXIV of 2 CFR and subtitle A and chapter I of title 34 of the Code of Federal Regulations, which was published at 79 FR 75871 on December 19, 2014, is adopted as a final rule with the following changes:

Title 34-Education

Subtitle A – Office of the Secretary, Department of Education

PART 75-DIRECT GRANT PROGRAMS

1. The authority citation for part 75 continues to read as follows:

Authority: 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

§75.135 [Amended]

2. Section 75.135(b) is amended by removing "34 CFR 80.36(d)(1)," and adding in its place "2 CFR 200.320(b),".

3. Section 75.263 is added to read as follows.

§75.263 Pre-award costs; waiver of approval.

A grantee may, notwithstanding any requirement in 2 CFR part 200, incur pre-award costs as specified in 2 CFR 200.308(d)(1) unless—

(a) ED regulations other than 2 CFR part 200 or a statute prohibit these costs; or

(b) The conditions of the award prohibit these costs.

(Authority: 20 U.S.C. 1221e-3 and 3474; 2 CFR 200.308 (d) (1))

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